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No. _____

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IN THE

Supreme Court of the United States

October Term, 1997

DALE KAYMARK,

Petitioner,

vs.

WAYNE E. BOLEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. Whether the Court of Appeals erred in holding that Fed.R.Civ.P. 4(m) permits a court to extend a Plaintiff's time for service of process absent good cause, where another Circuit Court of Appeals has vigorously argued that it does not?

Suggested Answer: Yes.

II. A. Whether the Court of Appeals erred in holding that the District Court could not consider, in making a discretionary decision to extend Plaintiff's time for service of process, the prejudicial effect on the Defendant of extending Plaintiff's time for service and of thereby allowing the Plaintiff to escape the bar of the statute of limitations, where the Plaintiff offered no ground at all in support of its request for extension of time for service?

Suggested Answer: Yes.

B. Whether the Court of Appeals erred in failing to find that the District Court's decision denying a discretionary extension of time could have been upheld on a different ground than that offered by the District Court: that the Plaintiff had offered no basis whatsoever for the District Court to grant an extension of time but had simply asked that an extension be granted?

Suggested Answer: Yes.

C. Whether the Court of Appeals erred in not considering whether a Plaintiff making a request for a discretionary extension of time to serve process under

Rule 4(m) has a burden of proof which is not met if the Plaintiff presents the District Court with no grounds at all to extend time?

Suggested Answer: Yes.

D. Whether the Court of Appeals violated the abuse of discretion standard of review where the Federal Rules of Civil Procedure make clear that whether to extend time absent good cause is a completely discretionary decision of the district court, where the Court of Appeals cited no error of law or other abuse of discretion committed by the District Court but only, in effect, stated that the Court of Appeals would not have relied upon this factor if it had been the court of first instance?

Suggested Answer: Yes.

E. Whether the Court of Appeals applied an insufficiently deferential version of the abuse of discretion standard of review to a discretionary decision of a district court to extend time for service of process under Rule 4(m)?

Suggested Answer: Yes.

F. Whether the Court of Appeals erred in failing to find that Rule 4(m) violates the Rules Enabling Act because it abridges a substantive right of a Defendant since it allows a Plaintiff to serve process on him after the Statute of Limitations has expired even absent good cause?

Suggested Answer: Yes.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 123 F.3d 756 (3d Cir. 1997) and appears as Appendix A ("App. A") hereto. The opinion of the District Court is not reported. The opinion of the District Court reviewed by the Court of Appeals appears as Appendix B ("App. B") hereto.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Third Circuit on August 25, 1997. This Court has jurisdiction to review this judgment pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL, STATUTORY, ETC. PROVISIONS INVOLVED

Fed.R.Civ.P. 4(m) provides as follows:

> **Time Limit for Service.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

STATEMENT OF THE CASE

This action arises out of a motor vehicle accident occurring on July 6, 1993 in Allegheny County, Pennsylvania. At the time of the accident, Respondent Wayne Boley (hereinafter "the Plaintiff") was a resident of Ohio and Petitioner Dale Kaymark (hereinafter "the Defendant") was a resident of Pennsylvania. On July 3, 1995, just three days before the two-year statute of limitations would expire, the Plaintiff filed a complaint in the United States District Court for the Western District of Pennsylvania seeking damages for personal injuries in excess of the jurisdictional limits. The District Court's subject matter jurisdiction was based on diversity of citizenship pursuant to 28 U.S.C. §1332(1).

On July 5, 1995, the Plaintiff attempted to serve the Defendant by certified mail. To be effective, service by mail under the Federal Rules requires a waiver by the Defendant. To effect such waiver, the Plaintiff must include various forms and other special items in his mailing pursuant to Fed.R.Civ.P. 4(d)(2). However, Plaintiff's mailing (which he sent a day before the statute of limitations expired on his action) merely consisted of a letter accompanied by a Summons and Complaint, and some discovery. In sending this mailing Plaintiff violated Rule 4(d)(2) in sundry respects: he did *not* request that the Defendant waive service of summons; he did *not* provide the Defendant with a notice and a request; he did *not* inform the Defendant, by means of a text prescribed in an official form promulgated pursuant to Fed.R.Civ.P. 84, of the consequences of compliance and of failure to comply with the request; and he did *not* provide the Defendant with an extra copy of any notice and request or a prepaid means of compliance in writing. The Plaintiff has admitted that his attempted service by mail on July 5, 1995 was insufficient.

On February 22, 1996, the Defendant filed a Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(2) and/or (5) on the basis of lack of personal jurisdiction and insufficiency of service of process. After receipt of this Motion, the Plaintiff allegedly attempted to serve the Defendant on two subsequent occasions (February 28 and March 21, 1996) by forwarding a copy of the Complaint, Summons and waiver form by certified mail. These attempts occurred some eight months after the filing of the Complaint, some four months after the Fed.R.Civ.P. 4(m) 120 day time limit had expired and after the Defendant had filed his Motion to Dismiss. The Defendant did not respond to the Plaintiff's request for waiver of personal service. The Plaintiff has never attempted to have the Defendant personally served.

The Plaintiff filed a Memorandum/Request for Extension on March 4, 1996 claiming the defective service was cured and stating that no harm was caused to the Defendant. In the Memorandum/Request for Extension, the Plaintiff did not raise arguments to support a finding of good cause for failing to serve the Defendant within the 4(m) time period. Furthermore, he did not raise arguments to support the District Court's use of its 4(m) discretionary powers. The Plaintiff merely asserted that he re-mailed the Summons and Complaint to the Defendant along with waiver of service documents.

On May 9, 1996, the Plaintiff filed a Supplemental Memorandum attaching documents which purported to comply with the service requirements of Fed.R.Civ.P. 4(d)(2). Again, the Plaintiff did not raise arguments to support a finding of good cause for failing to serve the Defendant within the 4(m) time period, and he did not raise arguments to support the District Court's use of its 4(m) discretionary powers.

On August 29, 1996, the District Court issued a Memorandum Opinion and Order granting the Defendant's Motion to Dismiss and denying the Plaintiff's Request for Extension of Time.

Plaintiff appealed the District Court's Order, and the Court of Appeals vacated the Order and remanded for further proceedings.

Defendant now seeks review by this Court.

REASONS FOR GRANT OF WRIT

I. There Is A Circuit Split Regarding The Interpretation Of Fed.R.Civ.P. 4(m). This Case Presents An Ideal Opportunity For This Court To Resolve This Split And Eliminate The Confusion Among Courts Of Appeals Regarding Rule 4(m), Which Was Created By The 1993 Amendments To The Fed.R.Civ.P.

This case involves an application of Fed.R.Civ.P. 4(m).[1] Rule 4(m) was added by the 1993 amendments to the Fed.R.Civ.P. and is a reformulated version of prior Rule 4(j).[2]

The Circuit Courts of Appeals are split as to whether there are substantive differences between new Rule 4(m) and old Rule 4(j). Specifically, the Fourth Circuit has held that there are no substantive differences and that Rule 4(m), as did Rule 4(j), "requires that if the complaint is not served within 120 days after it is filed, the complaint must be dismissed absent a showing of

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[1] This rule provides, in pertinent part, as follows:

> **Time Limit for Service.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. . . .

[2] Rule 4(j) reads, in pertinent part, as follows:

> **Summons: Time Limit for Service.** If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. . . .

good cause." *Mendez v. Elliot*, 45 F.3d 75, 78 (4th Cir. 1995). In contrast, other circuits, including the Third Circuit (whose opinion is questioned here), have held that Rule 4(m) increased the district court's power to grant an extension of time to serve process by allowing it to grant an extension not only for good cause, but also, in the court's discretion, in the absence of good cause. *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1305 (3d Cir. 1995) ("[w]e read [Rule 4(m)] to require a court to extend time if good cause is shown and to allow a court discretion to dismiss or extend time absent a showing of good cause").

In the instant case, the District Court found that the Plaintiff did not show good cause to extend time for service, and the Third Circuit Court of Appeals found that the District Court "did not abuse its discretion in finding that good cause had not been shown." App. A at A4. Hence, if the Fourth Circuit's interpretation of Rule 4(m) had governed on appeal, Defendant would have been victorious—for on that interpretation a district court may not extend time for service absent good cause. Therefore, review of this case by this Court would require resolution of this circuit split, and this Court should review it to resolve this split and clarify the law of this recently created rule.

II. The Court Of Appeals In This Case Decided (Or Assumed An Answer To) The Following Important Questions Of Federal Law That Have Not Been But Should Be Settled By This Court.

For the remainder of this discussion, Petitioner assumes, *arguendo*, that the Third Circuit's interpretation of F.R.Civ.P. 4(m) explained *supra*, is correct. Specifically, he assumes that a district court may grant an extension of time to serve process absent good cause on the Plaintiff's part.

The Petitioner asserts the following errors by the Court of Appeals in finding improper the District Court's denial of Plaintiff's request to extend time for service absent good cause.

A. The Court of Appeals Erred in Deciding that the District Court Lacked the Discretion, in making a Fed.R.Civ.P. 4(m) Discretionary Decision as to Whether to Extend Time for Service Absent Good Cause, to Consider Prejudice to the Defendant Resulting from the Plaintiff's Escaping the Bar of the Statute of Limitations. This Court Should Review this Case to Correct this Error by the Court of Appeals and to Clarify just what Factors a District Court may Consider in making a 4(m) Decision.

In the instant case, the Court of Appeals held that the District Court had erred in the reasoning it used to deny the Plaintiff's request for an extension of time to serve process absent good cause. Specifically, the Court of Appeals held that the District Court had considered an improper factor: that granting an extension would prejudice the Defendant since it would allow the Plaintiff to escape the bar of the statute of limitations. Petitioner argues that the Court of Appeals erred in finding that it was improper for the District Court to consider this factor: consideration of this factor is not an error of law and policy concerns support allowing a district court to rely on such considerations.

The Court of Appeals did not state explicitly why consideration of this factor (hereinafter "the disputed factor") was improper. Presumably, it believed that consideration of the disputed factor constituted an error of law. However, as is discussed next, none of the objections suggested or implied by the Court of Appeals' opinion pass muster as an error of law.

(1) *Advisory Committee Notes:* It might be claimed that the Court of Appeals established legal error because the advisory committee notes to Rule 4(m)[3] only list prejudice to a *plaintiff* (not a defendant) from the running of the statute of limitations as a factor to be considered in extending the time limit.

However, this attempt to establish legal error fails. The plain language of the committee notes indicates that they are only listing factors that would *support* a grant of relief. They make no listing of factors that would weigh *against* such a grant. Hence, the absence of the disputed factor from the advisory committee notes provides no support for the claim that the district court committed an error of law because the notes do not even purport to provide a list of factors that would support a denial of relief.

(2) *Lack of Legal Precedent:* It might also be argued that the Court of Appeals established legal error when it noted that there were many cases in which courts extended the time limit because the running of the statute of limitations would prejudice the plaintiff, but that it was "aware of no decisions refusing to grant an extension to serve under Rule 4(m) solely on the ground that denying the defendant the benefit of the running of the statute of limitations amounts to cognizable prejudice." App. A at A6.

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[3] These notes state, in pertinent part:

> The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. Such relief formerly was afforded in some cases, partly in reliance on Rule 6(b). Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service. . . .

However, the Defendant in fact cited just such a case in his brief. Appellee's Brief at 25; *see Madison v. BP Oil Co.*, 928 F.Supp. 1132, 1138-9 (S.D. Ala. 1996) (while the court "is not unmindful of the fact that plaintiff will lose her cause of action against Jones unless she is allowed to serve this defendant out of time with the original complaint, the Court cannot ignore the prejudice to be felt by Jones for allowing out of time service of the original complaint"). More importantly, the fact that few cases have alluded to the disputed factor in declining to extend time is irrelevant to establishing legal error. None of the cases cited by the Court of Appeals indicated that it was *impermissible* to consider the disputed factor. Furthermore, there is no principle of law dictating that a district court, in making a discretionary decision, may not take into account novel considerations.

(3) *Policy Considerations:* Though the Court of Appeals did not directly address policy considerations, it hinted that there might be something incongruous in allowing a district court to consider both prejudice to the defendant and prejudice to the plaintiff regarding the same factor. However, a careful analysis reveals that there is nothing incongruous in allowing a court to consider both these factors.

Depending on circumstances, it would be appropriate for a district court to consider *either* (1) the adverse impact on the defendant of extending time for service when that would allow the plaintiff to escape the bar of the statute of limitations, *or* (2) the adverse impact on the plaintiff of refusing to extend time for service and thus being barred by the statute of limitations.

Factor (1), the disputed factor, could be considered in those circumstances in which there are no special considerations justifying excusing the plaintiff from the bar of the statute; factor (2) could

> be considered when there are such special considerations. One example of such a special consideration might be if the plaintiff were occupied with a bitter divorce dispute while the statute of limitations for bringing another suit was running. Such circumstance would not constitute good cause for failure to timely serve the defendant, but it might warrant extending the time for service since it would indicate that the plaintiff was not idly sitting on his rights while the statute of limitations was running. In the instant case, the Plaintiff presented the District Court with no special considerations whatsoever in support of its request for an extension of time to serve process. Hence, it was appropriate for the District Court to apply factor (1).

This Court should review this case so that it may clarify that a district court may consider the disputed factor in deciding whether to extend time under Rule 4(m).

B. The Court of Appeals Erred in Failing to Find that it Could Uphold the District Court's Decision on another Ground: that the Plaintiff had not met His Burden of Offering some Basis upon which the District Court should Grant an Extension of Time. This Court should Review this Case to Clarify that a Plaintiff must Present a Court with some Basis for Granting an Extension of Time for Service of Process Before an Extension is Granted.

The Court of Appeals also erred in failing to affirm on another ground the District Court's decision denying relief. Specifically, the Court of Appeals could have held that denial of relief was appropriate simply because the Plaintiff failed to present to the District Court any grounds whatsoever in support of its request for an extension of time.

Petitioner is unaware of any case law specifically addressing the question of the parties' burden of proof in the context of a request for a Rule 4(m) absent-good-cause extension of time for service. However, surely the grant of such request, coming as it does in the absence of good cause and after the prescribed time period has elapsed, constitutes a request for *extraordinary relief to the plaintiff.* Hence, it should surely be the plaintiff who has the burden of both production and proof to establish grounds for such a request. Since, the Plaintiff here completely failed to satisfy either burden, the Court of Appeals could have held that, as a matter of law, the District Court should have denied the Plaintiff's request.

This Court should review this case to clarify that a plaintiff requesting a Rule 4(m) absent-good-cause extension has the burden of proof, production, and the burden of presenting *some* basis for relief to the district court before relief can be granted.

C. The Court of Appeals Erred in Failing to Consider that the Plaintiff did not meet his Burden of Proof in making his Request for an Absence-of-Good-Cause Rule 4(m) Extension of Time to Serve Process.

Petitioner has just argued that a plaintiff requesting a Rule 4(m) absence-of-good-cause extension of time should have the burden of proof and production, and that the Plaintiff in this case met neither burden. Petitioner now asserts that the Court of Appeals erred in failing to make any finding or even address the issue of Plaintiff's burden of proof. This was error because such a determination was a necessary precursor to the Court of Appeals deciding whether the District Court's determination was correct.

D. The Court of Appeals Violated and Misinterpreted the Standard of Review to be Applied in Reviewing the District Court's Discretionary Decision. This Court should Review this Case to Clarify the Standard of Review for Abuse of Discretion and to Correct this Error by the Court of Appeals.

In the instant case, the Court of Appeals correctly stated that it was reviewing the District Court's "denial of a Rule 4(m) motion to extend time to serve for abuse of discretion." App. A at A3. In another case, that Court stated that a district court abuses its discretion when its "decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Hofkin v. Provident Life & Accident Insur. Co.*, 81 F.3d 365 (3d Cir. 1996). The Court of Appeals then held, in this case, that the District Court had erred in considering the disputed factor, *i.e.*, prejudice to the defendant from the plaintiff's escaping the bar of the statute of limitations, in its decision to deny the Plaintiff's request for an extension of time absent good cause.

In so doing, the Court of Appeals violated the abuse of discretion standard of review. It did so because the only possible abuse of discretion committed by the District Court in relying on the disputed factor is that it commited an error of law. However, as was discussed *supra* sec. II.A, none of the objections suggested or implied in the Court of Appeals' opinion, concern errors of law.

Nevertheless, it might be argued that the District Court committed an error of law in that the Court of Appeals has the power to make law and, via its opinion in this case, it has created the very law that the District Court violated. The difficulty with such an argument is that it renders a nullity the limitations placed on a court

of appeals by the restrictions of review under the abuse of discretion standard. If a court of appeals could overturn a district court's discretionary decision through its power to create law *in that very same case*, then a court of appeals would have virtually unlimited authority to overturn discretionary decisions of district courts because the basis for its decision would become, *ipso facto*, the law. Moreover, such a procedure would violate the intent of the drafters of Rule 4(m) and of Congress, which let the rule stand as it was drafted. The rule was written in such a fashion to give the district court discretion; a court of appeals is without power to create law restricting that discretion to a narrower scope than what its drafters intended.

This Court should review this case so that it can correct the misapplication and misinterpretation of the abuse of discretion standard of review by the Court of Appeals.

E. In the Alternative, the Court of Appeals Erred by Applying an Insufficiently Deferential Standard of Review to this Case. Decisions of this Court and Policy Considerations Dictate that a Very Deferential Standard of Review Should be Employed in Reviewing a District Court's Rule 4(m) Discretionary Decisions. This Court should take this Opportunity to Clarify the Standard of Review of Rule 4(m) Decisions and to Correct this Error by the Court of Appeals.

If this Court does not agree that the Court of Appeals violated the abuse of discretion standard of review, Petitioner argues in the alternative that the Court of Appeals failed to apply a sufficiently deferential standard of review to this case. Petitioner makes this alternative argument with the knowledge that this Court may not consider there to be a single uniform abuse of

discretion standard of review, but a variety of such standards, each applicable to its own peculiar legal circumstance. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (determining appropriate abuse of discretion standard of review for imposition of sanctions under Fed.R.Civ.P. 11); *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980) (determining appropriate abuse of discretion standard of review for decisions under Fed.R.Civ.P. 54(b)).

In reviewing Rule 4(m) absent-good-cause requests for time extensions, a court of appeals should apply a very deferential standard of review. This standard of review should be similar to that employed in the context of review of transfer of venue decisions. In such a context, a district court not only has discretion to assign weights to factors as it sees fit, but it also has the freedom to choose the factors that it considers appropriate to balance. *See, e.g., Brierwood Shoe Corp. v. Sears Roebuck & Co.*, 479 F.Supp. 563, 565 (S.D.N.Y. 1979) (in considering whether to grant a motion to transfer venue a district court "has great discretion to consider whatever factors it chooses in deciding such motions"). Under such a standard, in the Rule 4(m) absent-good-cause context, a district court should be free to consider what factors it wished, unless a factor involved an error of law, *e.g.*, it violated constitutional procedural due process guarantees or was patently unreasonable. This Court should consider explicitly adopting such a standard of review for Rule 4(m) absent-good-cause decisions for the following reasons.

First, the language of the rule itself contains absolutely no limitation on the district court's discretion in making this decision: "If service . . . is not made . . . within 120 days . . ., the court . . . shall dismiss the action . . . or direct that service be effected within a

specified time. . . ." Fed.R.Civ.P. 4(m). Furthermore, the advisory committee notes to Rule 4(m), while listing *examples* of factors that might support a grant of relief, do not contain any language limiting in any way the factors a court may consider in deciding whether to grant or deny relief.

Second, this is a case in which the district court's discretion is based not on a common law doctrine but on the language of a rule. Hence, just as if the language were statutory, a court of appeals should not have the freedom to exclude factors not excluded by the language of the rule itself. This Court has made a similar finding in another context. In *Koon v. United States*, ____ U.S. ____, 135 L.Ed.2d 392 (1996), this Court held that, in considering the proper scope of appellate review of sentencing decisions governed by the U.S. Sentencing Commission Guidelines, "for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policy-making authority vested in the Commission." *Id.* at 418.

Third, Rule 4(m) contains an unusual two-part test which a district court follows in deciding whether to extend time for service: the court first considers whether there is good cause; if there is none, it then has discretion to grant or deny an extension absent good cause. This unusual structure, in which the first part of the test is governed by a standard, but the second has no standard specified whatsoever, clearly suggests that the district court is to have unusually broad discretion in deciding whether to extend time for service.

Fourth, this Court has held that two factors that support applying a deferential abuse of discretion standard to a district court's decision are (1) that the determination is fact intensive and (2) that the district

court has more experience handling such matters than an appeals court. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403-404 (1990). Both factors are present here. Deciding whether the circumstances of a case warrant extending time for service requires a close consideration of various facts, *e.g.*, whether the lack of timely service was due to an attorney's incompetence, whether there were any special local considerations that made service difficult (*e.g.*, weather), whether the attorney and his client are acting in good faith, etc.

This Court should take the opportunity to review this case and clarify that a very deferential abuse of discretion standard should apply to Rule 4(m) absent-good-cause decisions.

F. The Court of Appeals Erred in Failing to Strike Down Rule 4(m) as Violative of the Rules Enabling Act. It Violates the Act because it Abridges a Substantive Right of a Defendant by Permitting a District Court to Allow a Plaintiff, even Absent Good Cause, to serve process on a Defendant after the Statute of Limitations has expired.

The Rules Enabling Act, 28 USC §2072, prohibits this Court from enacting Rules of Procedure that "abridge, enlarge or modify any substantive right." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391 (1990). However, Rule 4(m), as interpreted presently by the Third Circuit, abridges a substantive right of a defendant because it empowers a district court to strip him of the protection of the statute of limitations at the district court's discretion. In particular, it allows a district court to strip him of that protection even absent any demonstration by the Plaintiff that he had good cause for failing to serve the Defendant within the specified time limit.

The Court of Appeals erred in failing to consider this, and this Court should review this case to strike down the relevant section of Rule 4(m).

III. CONCLUSION

For all the reasons noted above, Petitioner Dale Kaymark respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Opinion and Order of the United States Court of Appeals for the Third Circuit, Filed August 25, 1997.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

(Filed August 25, 1997)

No. 96-3573

WAYNE E. BOLEY,

Appellant,

v.

DALE KAYMARK,

On Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. No. 95-cv-01018)

Argued: June 3, 1997

Before: BECKER, SCIRICA, *Circuit Judges*, and SCHWARZER,* *Senior District Judge.*

(Filed August 25, 1997)

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* Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

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OPINION OF THE COURT

SCHWARZER, *Senior District Judge.*

The question before us is whether the district court abused its discretion in denying plaintiff's motion under Fed. R. Civ. P. 4(m) for additional time to serve process.

PROCEDURAL HISTORY

On July 6, 1993, defendant Dale Kaymark allegedly injured plaintiff Wayne E. Boley in an automobile collision in Beaver County, Pennsylvania. Almost two years later, on July 3, 1995, Boley filed a complaint in the United States District Court for the Western District of Pennsylvania.[1] Two days after filing the complaint Boley attempted to serve Kaymark by sending a copy of the complaint and summons to his home address via certified mail. The mailing did not include the forms necessary for Kaymark to waive personal service under Fed. R. Civ. P. 4(d). Absent a waiver, the Federal Rules require either personal service or, pursuant to Fed. R. Civ.P. 4(e)(1), service that complies with state law.[2]

1. Pennsylvania's statutory period for bringing a personal injury action is two years. 42 Pa. Cons. Stat. §5524(2).

2. Boley's attempted service by mail was insufficient under Pennsylvania law. *See* Pa. R. Civ. P. 400, 403.

Boley, however, made no further attempt to perfect service within the 120-day period required by Fed. R. Civ. P. 4(m).

On February 22, 1996, Kaymark moved to dismiss Boley's complaint under Fed. R. Civ. P. 12(b)(5) for failure to serve process within 120 days.[3] On March 4, 1996, Boley moved the court for an extension of time to serve pursuant to Fed. R. Civ. P. 4(m). The district court denied Boley's motion to extend time and granted Kaymark's motion to dismiss the complaint on August 29, 1996. Boley timely filed this appeal.[4] The district court had jurisdiction under 28 U.S.C. §1332, and we have appellate jurisdiction pursuant to 28 U.S.C. §1291.

DISCUSSION

We review the district court's denial of a Rule 4(m) motion to extend time to serve for abuse of discretion. *Ayers v. Jacobs & Crumplar, P.A.*, 99 F.3d 565, 568 (3d Cir. 1996). The determination whether to extend time involves a two-step inquiry. *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1305 (3d Cir. 1995). The district

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3. In response to Kaymark's motion to dismiss, Boley twice attempted service by mailing to Kaymark's residence additional copies of the complaint and summons, along with the waiver form. Apart from being untimely, the mailings did not effect service because Kaymark did not execute and return the waiver.

4. On September 9, 1996, Boley filed a motion for relief from judgment under Fed. R. Civ. P. 60(b)(1) and (6). On October 7, Kaymark filed its opposition. Meanwhile, on September 26, Boley filed his notice of appeal. The district court did not rule on the motion. In his brief, Boley has appended a copy of his motion together with the attached exhibits, which were not a part of the record before the district court when it ruled on the motion to dismiss. We grant Kaymark's motion to strike those portions of Boley's motion that were not before the district court. *See* Fed. R. App. P. 10(a); *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1307 n.12 (3d Cir. 1995); *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 706 n.2 (3d Cir. 1988).

court first determines whether good cause exists for a plaintiff's failure to effect timely service. If good cause exists, the extension must be granted. *Id.; see also,* Fed. R. Civ. P. 4(m). If good cause does not exist, the district court must consider whether to grant a discretionary extension of time. *MCI Telecomm. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1098 (3d Cir. 1995), *cert. denied,* 117 S. Ct. 64 (1996).

A. Mandatory Extension for Good Cause

The district court found that good cause had not been shown for Boley's failure to effect timely service. In determining whether good cause exists, a court's "primary focus is on the plaintiff's reasons for not complying with the time limit in the first place." *Id.* at 1097. Nothing in the record before the district court justified Boley's ineffective attempts at service and his failure to make a timely motion for an extension of time; as in *MCI*, the district court was "presented with no explanations as to what, if any, circumstances constitute sufficient 'good cause' to excuse [plaintiff's] apparent lack of diligence." *Id.* The district court therefore did not abuse its discretion in finding that good cause had not been shown.

B. Discretion to Extend Time for Service

The district court acknowledged that even in the absence of good cause, Rule 4(m) gives it discretion to extend the time for service. *See Petrucelli,* 46 F.3d at 1307. It said:

> The Court notes that even in the absence of good cause we may either dismiss the case without prejudice or extend time for service. The Court declines to grant an extension because of Boley's inexcusable delays and the prejudice such an extension would impose on Kaymark.

The court's summary statement in effect recapitulates its reasons for finding lack of good cause. That finding was proper for the reasons that (1) Boley had offered no explanation for his delay in making service, and (2) the running of the statute of limitations is not a proper consideration in determining whether good cause exists. *Petrocelli,* [sic] 46 F.3d at 1306. It does not follow, however, that the finding reflects a proper analysis under the discretionary step of Rule 4(m).

That Boley's delays were inexcusable, of course, merely reiterates the substance of the finding of no good cause and standing alone does not reflect an exercise of the discretion Rule 4(m) gives the court to extend time to serve in the absence of good cause. *See MCI,* 71 F.3d at 1098-99 (granting a discretionary extension on a record devoid of a showing by plaintiff of good cause). Critical to that finding was Boley's lack of explanation. *See id.* at 1097 ("absence of prejudice alone can never constitute good cause"). In its discretionary analysis, however, the court relied on its finding of prejudice to Kaymark, premised on the fact that, were an extension of time to effect service given to Boley, Kaymark would lose the benefit of the running of the statute of limitations.

In drafting the amendment of Rule 4(m), the Advisory Committee plainly had in mind, as its Notes state, "authoriz[ing] the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. . . *Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action* . . . ." Fed. R. Civ. P. 4(m) Adv. Comm. Notes (1993) (emphasis added). Interpreting this rule, under which the court may extend the time for service to *avoid* the bar of limitations, to authorize the court to *refuse* to extend it so the defendant may gain

the *benefit* of that bar appears to us to be inconsistent with its purpose. *See, e.g., Goodstein v. Bombardier Capital, Inc.*, 167 F.R.D. 662, 666-67 (D. Vt. 1996) (extending time in part to prevent plaintiff's case from being barred). We are aware of no decisions refusing to grant an extension to serve under Rule 4(m) solely on the ground that denying the defendant the benefit of the running of the statute of limitations amounts to cognizable prejudice.

That is not to say that the failure to make timely service may not prejudice a defendant. Delay may damage a defendant's ability to defend on the merits. *See, e.g., Gowan v. Teamsters Union (237)*, 170 F.R.D. 356, 360 (S.D.N.Y. 1997) (witness might not be available to testify and evidence was probably destroyed); *Shaw v. Rolex Watch U.S.A. Inc.*, 745 F. Supp. 982, 988 (S.D.N.Y. 1990) (without ruling on prejudice, court noted that named defendant died in the interim). In other contexts, as well, findings of prejudice have been limited to circumstances in which delay impaired a defendant's ability to defend. *See, e.g., Nelson v. County of Allegheny*, 60 F.3d 1010, 1014-15 (3d Cir. 1995) (under Rule 15(c), prejudice depended on whether defendant for lack of notice would have to assemble evidence when case was already stale) *cert. denied*, 116 S. Ct. 1266 (1966); *Feliciano v. Reliant Tooling Co.*, 691 F.2d 653, 657 (3d Cir. 1982) (under Rule 60(b), no prejudice absent loss of available evidence or "increased potential for fraud or collusion"). Moreover, actual notice to a defendant that an action was filed militates against a finding of prejudice. *See, e.g., Dominic v. Hess Oil V.I. Corp.*, 841 F.2d 513, 517 (3d Cir. 1988) (no prejudice to defendant under Rule 4(j) where defendant had actual notice of plaintiff's claim and facts on which it was grounded); *see also, Benjamin v. Grosnick*, 999 F.2d 590,

592 (1st Cir. 1993) (no prejudice under Rule 4(j) where defendant had actual notice of lawsuit); *Spencer v. Steinman*, ___ F. Supp. ___, 1997 WL 359028, *3 (E.D. Pa. June 24, 1997) (noting that actual notice "is crucial" to determining prejudice to the defendant); *Myers v. Secretary of the Dep't. of the Treasury*, ___ F.R.D. at ___, 1997 WL 306839 at *5 (E.D.N.Y. June 4, 1997) (rejecting prejudice when evidence showed defendant had been involved in settling merits claim). Here, it is not disputed that Kaymark was sent a copy of the complaint only two days after it was filed, and he makes no claim of lack of actual notice.

District courts have consistently interpreted Rule 4(m) in the same way, treating the running of the statute of limitations as a factor favoring the plaintiff and not as a basis for potential prejudice to the defendant. *See, e.g., Mason Tenders Dist. Council Pension Fund v. Messara*, 1997 WL 221200 *4-5 (S.D.N.Y. April 1, 1997); *Rose v. Forbes Metro. Hosp.*, 72 Fair Empl. Prac. Cas. (BNA) 549, 1996 WL 752530, *2-3 (W.D. Pa. Oct. 18, 1996); *National Union Fire Ins. Co. v. Forman 635 Joint Venture*, 1996 WL 272074, *3 (S.D.N.Y. May 21, 1996); *Binicewicz v. General Elec. Co.*, 1995 WL 628425, *2-3 (N.D. Ill. Oct. 25, 1995); *Pickney v. Sheraton Soc'y Hill*, 1994 WL 376862, *3 (E.D. Pa. July 15, 1994); *Williams v. United Parcel Serv.*, 1991 WL 264651, *2 (N.D. Ill. Dec. 9, 1991).

We conclude that while the running of the statute of limitations is a factor supporting the discretionary *granting* of an extension of time to make service under Rule 4(m), it is not a factor that standing alone supports a finding of prejudice to the defendant. As stated by one district court, prejudice "involves impairment of defendant's ability to defend on the merits, rather than

foregoing such a procedural or technical advantage." *National Union Fire Ins. Co. v. Barney Assoc.*, 130 F.R.D. 291, 294 (S.D.N.Y. 1990).

The district court, of course, retains discretion to refuse to extend time, even if the statute of limitations has run. *See Petrucelli*, 46 F.3d at 1306 ("a district court may in its discretion still dismiss the case, even after considering that . . . the refiling of an action is barred"). *See, e.g., Adams v. Allied Signal Gen. Aviation Avionics*, 74 F.3d 882, 887-88 (8th Cir. 1996) (refusing a discretionary extension of time to serve despite the running of the statute of limitations). In this case, however, the court's exercise of its discretion was premised on an erroneous finding of prejudice.

Because we do not know what choice the district court would have made had it correctly considered the relevant factors bearing on the exercise of discretion, *see United States v. Monaco*, 23 F.3d 793, 799 (3d Cir. 1994); *Lieb v. Topstone Indus. Inc.*, 788 F.2d 151, 153 (3d Cir. 1986), we VACATE the order and REMAND for further proceedings consistent with this opinion. On remand the district court may find it appropriate to augment the record on the parties' motion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Memorandum Opinion of the United States District Court for the Western District of Pennsylvania, Dated August 29, 1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 95-1018

WAYNE E. BOLEY,

Plaintiff,

v.

DALE KAYMARK,

Defendant.

MEMORANDUM OPINION

CINDRICH, District Judge August 29, 1996

This is a tort action, brought pursuant to diversity jurisdiction. Plaintiff, Wayne E. Boley ("Boley"), is a resident of Ohio and Defendant, Dale Kaymark ("Kaymark"), is a resident of Pennsylvania. Pending now before this Court is Defendant's Motion to Dismiss for lack of jurisdiction over his person and for insufficiency of service of process, pursuant to Federal Rules of Civil Procedure 12(b)(2) and (5). For the reasons stated below, Defendant's Motion to Dismiss will be granted.

Boley avers that on or about July 6, 1993 he and Kaymark were in an automobile accident at the intersection of Pennsylvania State Route 30 and the Steubenville Pike. Boley alleges that Kaymark failed to

yield the right of way, causing the two motorists to collide. Boley filed his complaint in this Court on July 3, 1995, claiming serious and permanent injuries as a proximate result of this collision and seeking damages in excess of fifty thousand dollars. Two days later, in an attempt to effectuate service of process, Boley's attorney sent a letter, a summons, and a complaint, via certified mail, to Kaymark's home address.

Service by mail is allowed in the district courts pursuant to Rule 4(d). Rule 4(d) requires that a plaintiff notify a defendant of the commencement of an action and request that the defendant waive personal service. In summary, Rule 4(d) reads that the notice and request must:

> A) be in writing and addressed directly to the defendant;
>
> B) be dispatched via first-class mail or other reliable means;
>
> C) include a copy of the complaint and identify the court in which it has been filed;
>
> D) inform the defendant of the consequences of compliance or failure to comply;
>
> E) set forth the date on which the notice was sent;
>
> F) allow the defendant a reasonable time to return the waiver; and
>
> G) include an extra copy of the notice and request for waiver, with a prepaid means of compliance.

Fed. R. Civ. P. 4(d)(2). As noted in Boley's Memorandum Contra to Defendant's Motion to Dismiss, Boley inadvertently omitted certain required documents from the July 5, 1995 mailing to Kaymark. Thus, the documents mailed on that date did not conform to the requirements of Rule 4(d) and were insufficient to effectuate service of process or effective waiver thereof.

In any event, even if Boley's counsel had mailed all of the required documents to Kaymark, this method of service is wholly dependent upon Kaymark's compliance in returning the waiver form. Fed. R. Civ. P. 4(d)(2)(G). The consequence of a defendant's failure to comply with a request for waiver is that the court may impose the costs of effectuating service on that defendant. *Id.* Service of process, however, remains ineffective. Upon receipt of a request for waiver of personal service, "the defendant may either acknowledge service, in which case process has been properly served, or may do nothing, in which case the plaintiff must resort to personal service." *Umbenhauer v. Woog*, 969 F.2d 25, 29 (3d Cir. 1992). Kaymark returned nothing, thus, he failed to acknowledge service. Although failure to acknowledge service is not preferred under Rule 4(d), the Third Circuit has clearly stated that this is a defendant's prerogative. Therefore, Boley had to next attempt personal service pursuant to Rule 4(e).

Service upon a defendant from whom a waiver has not been obtained is governed by Rule 4(e). Rule 4(e) allows service to be effected in one of the following two ways:

> 1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
>
> 2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Fed. R. Civ. P. 4(e). If attempting to effectuate service under the Rule 4(e)(1) option, a plaintiff must follow the law of the state in which the district court is located or the state in which service is to be effected. In either circumstance, that state is Pennsylvania in the present case. Rule 400 of the Pennsylvania Rules of Civil Procedure states that in an action of this type, original process shall be served within the Commonwealth only by the sheriff. Pa. R. Civ. P. 400(a). Alternatively, under the Rule 4(e)(2) option, a plantiff can effectuate service by having someone who is not a party to the action and who is at least eighteen years of age personally deliver a copy of the summons and the complaint to the defendant or leave copies thereof at the defendant's home. There is, however, no evidence that Boley has ever attempted to procure service by a sheriff under Rule 4(e)(1) or to serve personally pursuant to Rule 4(e)(2). Therefore, we are left only to consider Boley's motion under Rule 4(m)[1] for an extension of time to serve pursuant to Rule 4(m) and his subsequent attempt to effect service.

Rule 4(m) states that the court, upon motion or sua sponte, may either dismiss an action without prejudice, if service is not made upon the defendant within 120 days of the filing of the complaint, or extend the time for service for an appropriate period, if the plaintiff can show good cause for failing to serve. Fed. R. Civ. P. 4(m). When entertaining a motion to extend the time for service, the district court must first determine whether good cause exists. *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1305 (3d Cir. 1995). If good cause does

[1] On March 4, 1996, Plaintiff filed a Memorandum Contra to Defendant's Motion to Dismiss which included a request for an extension of time to effect service pursuant to Rule 8(m). There is no Rule 8(m), therefore, the court construed Plaintiff's request as being pursuant to Rule 4(m).

exist, then the inquiry is ended and the court must grant an extension. *Id.* To assess good cause, "the primary focus is on the plaintiff's reasons for not complying with the time limit in the first place." *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995). To determine the existence of good cause, courts have considered three factors: "(1) reasonableness of plaintiff's efforts to serve (2) prejudice to defendant by lack of timely service and (3) whether plaintiff moved for an enlargment of time to serve." *Id.*

As previously noted, Boley did move for an extension of time to effect service. His motion was filed on March 4, 1996, however, 120 days after the initial 120 days allowed for service. Furthermore, Boley's motion does not even address the "good cause" requirement of Rule 4(m).

In addition, when Boley filed his motion for an extension he simultaneously mailed to Kaymark a summons, a waiver form, and a complaint. Boley asserts in his motion that any defect in service has been corrected because of this new mailing. What Boley fails to understand is that service has yet to be perfected because Kaymark has never acquiesced to Boley's request for waiver of personal service. The initial attempt to effect waiver of service, though ineffective, was timely; however, it is inexcusable to have waited approximately eight months before taking any further action to perfect service. When construing the meaning of Rule 4, "inadvertence of counsel does not constitute good cause." *Braxton v. U.S.*, 817 F.2d 238, 242 (3d Cir. 1987).

In sum, for reasons unknown, Boley did not request an extension of time to serve or make an effective attempt to obtain a waiver until 240 days after the

complaint was filed. Moreover, these efforts were made only after Kaymark filed his motion to dismiss for insufficiency of service. In any event, this Court has not and will not extend the time for service beyond the 120 days set forth by Rule 4(m), because Boley has made no showing of good cause for failing to comply with the original time limit.

Next, we will consider the possible prejudice to Kaymark if an extension were granted. Under Pennsylvania law, actions to recover damages for injuries to a person must be commenced within two years. 42 Pa. C.S. §5524(2). The statutory period begins to run from the date on which the injury is sustained, unless such injuries are unascertainable despite the exercise of due diligence. *Dreischalick v. Dalkon Shield Claimants Trust*, 845 F. Supp. 310, 314 (W.D.Pa. 1994). The statutory period in the instant case, therefore, began to run on July 6, 1993, the date of the accident. If the instant Motion to Dismiss is granted, Boley would be time-barred from re-filing his complaint because the applicable statute of limitations expired on July 6, 1995, a mere three days after he filed the complaint. Contrary to Boley's assertions, an extension of time for service now would work extreme prejudice against Kaymark. The purpose of the limitations period is to protect the defendant from having to defend against stale claims and to ensure and restore stability and security to people's affairs. *Nelson v. County of Allegheny*, 860 F.Supp. 1080, 1082 (W.D.Pa. 1994). Allowing Boley to effect service some three and one-half years after the date of the accident would certainly undermine these goals.

Furthermore, a district court may not consider the fact that the statute of limitations has run when assessing whether good cause exists. *Petrucelli*, 46 F.3d

at 1306. The running of the statute of limitations does not require the district court to extend the time for service of process; rather, it is within the discretion of the district court to dismiss an action, the refiling of which would be time-barred. *Id.* "The lesson to the federal plaintiff's lawyer is not to take any chances, treat the 120 days with the respect reserved for a time bomb." *Id.*, citing *Braxton*, 817 F.2d at 241.

The Court notes that even in the absence of good cause we may either dismiss the case without prejudice or extend the time for service. *Petrucelli*, 46 F.3d at 1305. The Court declines to grant an extension because of Boley's inexcusable delays and the prejudice such an extension would impose upon Kaymark.

An order consistent with this opinion will be entered.

Order of the United States District Court for the Western District of Pennsylvania, Dated August 29, 1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 95-1018

WAYNE E. BOLEY,

Plaintiff,

v.

DALE KAYMARK,

Defendant.

O R D E R

AND NOW, this 29 day of August 1996, for the reasons stated in the memorandum opinion filed on this date in the above-captioned matter, IT IS HEREBY ORDERED that defendant's Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(2) and (5) (Document No. 5) is GRANTED; and, plaintiff's Motion to Extend Time to Effect Service (Document No. 6) is DENIED.

s/ Robert J. Cindrich
ROBERT J. CINDRICH
United States District Judge

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APPENDIX C

Order of the United States Court of Appeals for the Third Circuit, Dated November 12, 1997.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

(Dated November 7, 1997)

No. 96-3573

Re: Boley v. Kaymark

Present: Becker, *Circuit Judge*

Motion by Appellee For Recall and Stay Issuance of Mandate Pending Petition To The United States Supreme Court For Writ Of Certiorari.

For your information the opinion was filed and judgment entered on 8/25/97. Mandate issued on 9/16/97.

s/ SUSAN M. ACERBA
Susan M. Acerba
Case Manager Direct Dial 597-3014

O R D E R

The forgoing motion is/~~are~~ granted.

By the Court,

s/ EDWARD R. BECKER
Circuit Judge

Dated: NOV 12 1997

SMA cc TO: AJC
MCT

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-875

In The

Supreme Court of the United States

October Term, 1997

DALE KAYMARK,

Petitioner,

vs.

WAYNE E. BOLEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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COUNTERSTATEMENT OF FACTS

Respondent, Wayne E. Boley, hereinafter referred to as "Boley", a resident and citizen of the State of Ohio, on July 6, 1993 in Beaver County, Pennsylvania incurred personal injuries in a two vehicle motor vehicle collision caused by Petitioner, Dale Kaymark, hereinafter referred to as "Kaymark", a resident and citizen of the Commonwealth of Pennsylvania. Boley claims that Kaymark was negligent in causing this collision because Kaymark failed to yield the right-of-way to Boley as required by law.

On July 3, 1995, Boley timely filed a Complaint against Kaymark in the United States District Court for the Western District of Pennsylvania. Jurisdiction for this action in the United States District Court for the Western District of Pennsylvania was based upon 28 U.S.C. § 1332. On July 5, 1995, Boley complied, in part, with Rule 4(d) of the Federal Rules of Civil Procedure by sending Appellee a letter, Summons and Complaint by way of Certified Mail, to Kaymark's home address in Pennsylvania.[1]

The Complaint forwarded to Kaymark on July 5, 1995 clearly notified Kaymark that legal action had been commenced against him by Boley for this collision. Kaymark did not respond. The District Court found that the documents forwarded to Kaymark on July 5, 1995 failed to conform with all of the requirements of F.R.C.P. 4(d). The transmittal letter did not

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1. Boley forwarded to Kaymark on July 5, 1995 by Certified Mail, Return Receipt Requested: (1) the Complaint; (2) Summons; (3) Request for Production of Documents; (4) Interrogatories; and (5) a letter advising that he was required to answer the Complaint with twenty (20) days. The document which was lacking was the "Notice of Lawsuit and Request for Waiver of Service for Summons". That document was forwarded to Kaymark on February 28, 1996.

expressly notify Kaymark of the commencement of an action, even though the Complaint did, and/or request that he waive personal service and/or provide a "waiver of service" form which Kaymark could return for filing.

On December 6, 1995, counsel for Kaymark entered a general appearance. On February 22, 1996, Kaymark filed an F.R.C.P. 12(b) Motion to Dismiss. Kaymark's 12(b) Motion was based on Boley's failure to perfect service of process as required by Rule 4 of F.R.C.P. On February 28, 1996, Boley filed a Memorandum contrary to Kaymark's Motion to Dismiss.[2] Boley also requested an extension of time to effect service, pursuant to Rule 4(m) of F.R.C.P.

On February 28, 1996, Boley served upon Kaymark a copy of the same documents plus the form and self addressed envelope.[3] On May 7, 1996, Boley filed a supplemental Memorandum contrary to Kaymark's Motion to Dismiss and an Affidavit of Service confirming that Kaymark was served with a Complaint and Summons by Certified Mail on February 28, 1996 and March 21, 1996.

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2. The District Court specifically treated a pleading styled as a "Memorandum Contrary to Defendant's Motion to Dismiss" as a Motion per F.R.C.P. 4(m) to extend the time in which to complete the service of process required by F.R.C.P. 4(m). The District Court acknowledged ". . . Boley did move for an extension of time to effect service. His motion was filed on March 4, 1996 . . ." (Pet. at A13).

3. On February 28, 1996, Boley served, by Certified Mail, the following documents on Kaymark:

1) Complaint;
2) Summons;
3) Notice of Lawsuit and Request for Waiver of Service for Summons;
4) Request for Production of Documents;
5) Interrogatories; and
6) Self-addressed stamped envelope.

On March 21, 1996, a copy of the same documents served by Certified Mail on February 28, 1996 were served a second time on Kaymark by Certified Mail.[4] Kaymark did not respond to the letter of February 28, 1996 nor the letter of March 27, 1996. Kaymark did not sign and return the waiver of service of Summons forwarded to him on February 28, 1996 and March 27, 1996.

Kaymark claimed in the February 22, 1996 Rule 12(b) Motion that, among other things, Boley had failed to fully comply with the service of process requirements set forth in F.R.C.P. 4(d). Boley was not given the opportunity in the District Court to make a record to establish the facts and circumstances surrounding the delay in perfecting the service process requirements between July 3, 1995 and February 22, 1996.

On August 29, 1996, the District Court, in a Memorandum Opinion and Order, granted Kaymark's Motion to Dismiss. The District Court held that Boley failed to comply with Rule 4 of F.R.C.P. and the underlying Pennsylvania law and timely complete the service of process requirements which Appellant had started on July 5, 1995.

The District Court, in refusing to grant Boley's request to extend the time beyond the 120 days to complete service of process, concluded that granting Boley's Motion would cause

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4. On March 21, 1996 Appellant served, by Certified Mail, the following documents on Appellee:

1) Complaint;
2) Summons;
3) Notice of Lawsuit and Request for Waiver of Service for Summons;
4) Request for Production of Documents;
5) Interrogatories; and
6) Self-addressed stamped envelope.

Kaymark "severe prejudice" in the context of a statute of limitations defense. No other reason was given by the District in denying Boley's request. Under the controlling law, Kaymark did not have a valid statute of limitations defense and considering that this was the sole reason given by the District Court for denying Boley's request to extend the time to complete service of process, there was no evidence before the District Court that Kaymark would suffer any prejudice if Boley's Motion was granted.

The court below was correct in concluding that the District Court committed an abuse of discretion in denying Boley's request, as it was based on an error of law.[5] Under these circumstances, the appropriate remedy was for the court below to remand this matter to the District Court for further consideration of Boley's request to extend the time of service beyond 120 days.

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5. *See* the authorities cited on page 16-17 of this response.

REASONS FOR DENIAL OF WRIT

I.

WHETHER THE COURT BELOW'S HOLDING THAT RULE 4(m) OF F.R.C.P., AS AMENDED, ALLOWS A DISTRICT COURT DISCRETION TO EXTEND THE TIME FOR COMPLETION OF SERVICE OF PROCESS BEYOND THE 120 DAYS FROM THE DATE WHEN THE ACTION WAS FIRST FILED, EVEN THOUGH "GOOD CAUSE" MAY NOT FIRST HAVE BEEN ESTABLISHED, IS IN ACCORD WITH RULE 4(m), AS AMENDED; THE ADVISORY COMMITTEE NOTES TO THIS RULE; AND THE HOLDINGS OF OTHER CIRCUITS SPECIFICALLY ADDRESSING THIS ISSUE.

In *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1305 (3rd Cir. 1995), the Third Circuit held that F.R.C.P. 4(m) as amended allowed a District Court, in its discretion, to extend the time to complete service of process without first requiring that "good cause" be established for such an extension. *See also MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1098 (3rd Cir. 1995). The court below followed its holding in *Petrucelli*, *supra* when reversing and remanding this matter to the District Court.

Kaymark now claims, for the first time in its Petition for Certiorari, that neither the Third Circuit nor the District Court should have followed the holding in *Petrucelli*, *supra*, set forth above. Kaymark claims that the Fourth Circuit's holding in *Mendez v. Elliot*, 45 F.3d 75, 78 (4th Cir. 1995), to the effect that a District Court does not have this discretion to extend the time in which service can be established beyond 120 days unless "good cause" is first established is the correct interpretation of Rule 4(m), as amended.[6]

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6. Neither in the District Court nor in the court below did Kaymark (Cont'd)

The court below's holding that a District Court has the discretion to extend the time of service beyond the 120 day period of time, set forth in the Rule, even though good cause for such an extension was not first established, is consistent and in accord with the language of F.R.C.P. 4(m), as amended, the committee notes to F.R.C.P. 4(m), as amended, and the holding of those other circuit courts which have addressed this specific issue. *See Adams v. Alliedsignal General Aviation Avionics*, 74 F.3d 882, 887 (8th Cir. 1996) ("If plaintiff fails to show good cause, the court may still extend the time for service rather than dismiss the case without prejudice"); *Espinoza v. United States*, 52 F.3d 838, 841 (10th Cir. 1995) (". . . failure to show good cause for the mandatory extension of time does not end the inquiry . . . The district court must still consider whether a permissive extension of time may be warranted"); *Thompson v. Brown*, 91 F.3d 20 (5th Cir. 1996) (". . . 4(m) broadens a district court's discretion by allowing it to extend the time for service, even when a plaintiff fails to show good cause"); *Del Raine v. Carlson*, 1996 U.S. App. Lexis 2645 (7th Cir. 1995) (The Seventh Circuit concludes that Rule 4(m), as amended, represents a "significant change" and allows a district court discretion to extend the time for service, even if good cause is not shown).[7]

(Cont'd)
raise the issue that the District Court lacked discretion to extend the time for service under these circumstances. Kaymark assumed this was the controlling law. Therefore, the issue that was presented to the court below was whether or not there was an "abuse of discretion" in not granting such an extension to Boley, even though good cause was not first established.

7. District Courts in some circuits, other than the Third, Fifth, Seventh, Eighth and Tenth Circuits, have concluded that new F.R.C.P. 4(m) allows a District Court to extend the time of service beyond 120 days, absent a showing of good cause. *See Myers v. Secretary of the Department of Treasury*, 173 F.R.D. 44, 47 (E.D.N.Y. 1997); *Binicewicz v. General Electric Co.*, 1995 WL 628425 (N.D. Ill. 1995).

Before the 1993 amendments to the Federal Rules of Civil Procedure, this issue was controlled by F.R.C.P. 4(j). That Rule provided, in part:

> (j) Summons: Time limit for service. If a service of the summons and complaint is *not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice . . .*

(Emphasis supplied).

In 1993, Rule 4 was amended. What was formerly covered by F.R.C.P. 4(j), above, was now covered by F.R.C.P. 4(m). F.R.C.P. 4(m), as amended provides:

> (m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion *or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period . . .*

(Emphasis supplied).

The mandatory dismissal language after 120 days between the time the action was commenced and the lack of completion of service of process contained in F.R.C.P. 4(j) was deleted by

the 1993 amendments. The advisory committee notes recognized the significance of this change when they reported:

> The *new subdivision* explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, *and authorizes the court to relieve a plaintiff of the consequence of an application of this subdivision even if there is no good cause shown.*

(Emphasis supplied).

In its Petition for Certiorari, Kaymark claims, despite the change in the language between old F.R.C.P. 4(j) and new F.R.C.P. 4(m), the Advisory Committee Notes, made reference to above, and the holding by the Third Circuit in *Petrucelli, supra*; *Adams, supra*; and *Espinoza, supra*, that the rules require a mandatory dismissal of the action after 120 days if service has not been completed and good cause has not been first established for the delay in completion of the service of process. Relying upon the holding by the Fourth Circuit in *Mendez, supra*, 45 F.3d at 78-79, Kaymark claims to the effect that a district court, under F.R.C.P. 4(m), as amended, did not have any discretion to extend the time of service without a showing of "good cause" if more than 120 days had expired from the time the action was initiated. *Mendez, supra* is distinguishable from the instant case on its facts. In *Mendez, supra*, there was no contention made by Mendez in the District Court that the District Court had discretion to extend the time for service when service had not been accomplished within 120 days. *See Mendez, supra*, 45 F.3d at p. 79 (". . . Mendez never requested an extension of time . . ."). Therefore, the District Court was not faced with a request to extend the time of service, even though good cause had not been first established based on the language change

created to Rule 4(m) by the 1993 amendments. Because that specific issue was not raised in the District Court, it was not addressed by the Fourth Circuit. Secondly, the Fourth Circuit made a factual finding that Mendez never requested an extension of time to complete this service of process. *Mendez, supra*, 45 F.3d at 79. Here, the District Court acknowledged that Boley in fact, had requested an extension of time to complete service.[8]

The precise issue presented here was not presented to the Court in *Henderson v. United States*, 116 S. Ct. 1638, 134 L. 3d 880, __ U.S. __ (1996) because the action was an admiralty or maritime action per 47 U.S.C.A. § 741, *et seq.* started in 1991, prior to the 1993 amendments. However, this Court addressed the 1993 amendments to F.R.C.P. 4(m) stating:

> Most recently, in 1993 amendments to the Rules, courts have been accorded discretion to enlarge the 120-day period, "even if there is no good cause shown." See Advisory Committee's Notes on Fed. Rule Civ. Proc. 4, 28 U.S.C. App., p. 654.

116 S. Ct. at 1643.

> The Federal Rules thus convey a clear message: Complaints are not to be dismissed if served within 120 days, or within such additional time as the court may allow.

116 S. Ct. at 1644.

The Advisory Committee Notes to F.R.C.P. 4(m), as amended, state that the 1993 amendments intended to give a District Court discretion to extend the time to complete service of process after a lapse of 120 days, even though good causae is

8. *See* page 2, n.2.

not first shown. One of the examples that the Committee cited as to when the Court should act is the precise situation presented here, *i.e.*, a dismissal without prejudice but after the statute of limitations had run so any subsequent action would be barred by the statute of limitations.

The Third, Fifth, Seventh, Eighth and Tenth Circuits have followed the Advisory Committee's suggested interpretation of Rule 4(m), as amended. This Court in *Henderson, supra*, 116 S. Ct. at 1643-44, acknowledges this to be the correct interpretation of Rule 4(m), as amended.

The court below here correctly concluded that the District Court had this discretion, even though good cause was not first shown. It correctly found that the District Court abused its discretion in denying Boley's March 4, 1996 request to extend the time to complete formal service of process. The court below correctly concluded that in deciding whether Boley's Motion should be granted, proof of "actual prejudice" to Kaymark was a relevant factor to be considered by the District Court. Here, the court below correctly determined that there was no evidence that Kaymark would suffer any actual prejudice if Boley's Motion was granted.

II.

WHETHER THE COURT BELOW'S HOLDING, BY IMPLICATION, THAT THIS ACTION WAS TIMELY FILED IN THE DISTRICT COURT TO SATISFY THE CONTROLLING STATUTE OF LIMITATIONS AND WHETHER THE TOLLING OF THE CONTROLLING STATUTE OF LIMITATIONS WAS NOT DEPENDENT UPON COMPLETION OF FORMAL SERVICE OF PROCESS WHEN KAYMARK HAD MULTIPLE ACTUAL NOTICES OF THE CLAIM OF BOLEY IS IN ACCORD WITH THE CONTROLLING LAW.

In refusing to grant Boley's request to extend the time in which Boley had to complete the service of process on Kaymark, the District Court concluded that the policy supporting the controlling two year statute of limitations for personal injury actions in Pennsylvania, *i.e.*, 42 Pa. C.S.A. 5524(2), would be violated if Boley's motion was granted and if Boley completed the service on Kaymark, as requested.[9] No other reason, other than statute of limitations reasons, was given by the District Court in denying Boley's Motion.

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9. The District Court concluded, in denying Boley's motion to extend the time for service, stating:

> Contrary to Boley's assertions, an extension of time for service now would work *extreme prejudice against Kaymark*. The purpose of the statute of limitations period is to protect the defendant from having to defend against stale claims and to ensure and restore stability and security of the peoples' affairs. *Nelson v. County of Allegheny*, 860 F. Supp. 1080, 1082 (W.D. Pa. 1994). Allowing Boley to effect service some 3-1/2 years after the date of the accident *would certainly undermine these goals*.

(Emphasis provided).

In the District Court, Kaymark presented no evidence or argument that actual prejudice was suffered by Kaymark from Boley's failing to timely complete the service of process procedures required by law. Kaymark's counsel entered a general Appearance on December 6, 1995 and prior to service of process being completed. It can be easily inferred from the record that Kaymark, having already received the actual Complaint by certified mail and other related documents, provided them to his liability insurance carrier. The liability insurance carrier, in turn, requested their counsel to enter a general Appearance on Kaymark's behalf.

There is no evidence that Kaymark and/or his counsel have lost any evidence or any advantage from Boley's failure to strictly comply with F.R.C.P. 4(m), as amended, and timely complete the service of process between July 3, 1995 and December 6, 1995, and/or the date when a general Appearance was entered by counsel for Kaymark. Clearly, Kaymark suffered no prejudice between December 6, 1995 and March 4, 1996, when Boley filed his Motion to extend the time to complete service. Counsel's general Appearance on the record during the period from December 6, 1995 through March 4, 1996 gave Kaymark all the protection Kaymark needed. Kaymark had all the rights he needed to defend this claim on its merits if, during that time period, service of process had been completed.

The major premise of Petitioner's argument in Sections II (A) and (F) of Petitioner's Brief is that the Court below's decision impairs a statute of limitations defense which Kaymark has to Boley's claim. Kaymark, for reasons more fully explained in this Brief, does not have a valid statute of limitations defense to Boley's claim. Kaymark has incorrectly linked the completion of formal service of process as being necessary to timely toll the running of the statute of limitations.[10] Pennsylvania and other

10. This issue is controlled by Pennsylvania law. *See Patterson v.* (Cont'd)

jurisdictions do not require the completion of formal service of process to toll the running of the statute of limitations.

The District Court's holding that the policy behind the Pennsylvania statute of limitations would be violated if Boley's Motion to extend the time to complete service was granted was contrary to the Pennsylvania and/or controlling law. That law provides that the statute of limitation provisions are satisfied with the timely filing of the action in the District Court. It is not dependent upon formal completion of service of process, providing that the defendant is given adequate notice of the filing of the action.[11]

Boley timely filed this action in accordance with the controlling Pennsylvania statute of limitations for personal injury actions, 42 Pa. C.S.A. 5524(2). Boley gave Kaymark multiple actual written notices, including providing Kaymark, on one or more occasions, copies of the complaint initiating the action against Kaymark. Those mailings started on July 5, 1993.

(Cont'd)
American Bosch Corp., 914 F.3d 384, 387 (3rd Cir. 1990) (the state law of the forum state in an adversity action is the controlling law for statute of limitations purposes).

11. The Pennsylvania law is set forth in *Patterson v. American Bosch Corp.*, 914 F.2d 384, 391-92 (3rd Cir. 1990) (timely filed Writ of Summons and good faith attempt to serve the Summons is sufficient to toll the statute of limitations); *Leidich v. Franklin*, 394 Pa. 302, 575 A.2d 914, 918-19 (1990) (good faith defective service of an action timely filed is sufficient to toll the running of the statute of limitations for personal injury actions in Pennsylvania); *Fulco v. Shaffer*, __ Pa. Super. __, 686 A.2d 1330, 1334 (1996) ("statute of limitations has been tolled" if action was timely filed and the defendant was given actual notice by 'defective' process"); and *Young v. PennDot*, __ Pa. Cmwlth. __, 690 A.2d 1300 (1997) (statute of limitations for personal injury actions in Pennsylvania is tolled if the action was timely filed and if good faith, though defective, service by mail was attempted).

Even though Kaymark would not voluntarily sign the "waiver", which was provided him in February and March, 1994, and even though formal service of process was not completed by having personal service made upon Kaymark, the District Court erroneously concluded that the policy supporting Pennsylvania's two year statute of limitations would be violated by granting Boley's request for extension of time to accomplish formal service of process upon Kaymark.

Once Kaymark's statute of limitations argument is disposed of in accordance with the controlling law, the court below had no evidence before it that Kaymark would suffer any prejudice if Boley's F.R.C.P. 4(m) Motion to extend the time for completion of service of process was granted by the District Court. On the other hand, the denial of Boley's Motion would effectively barr any further action by Boley and cause Boley significant prejudice. The filing of any subsequent action by Boley, if this action was dismissed, would be barred by the controlling statute of limitations.[12]

Kaymark had timely actual notice of the action and counsel had entered their general Appearance before service of process was completed. There was no evidence before the District Court that Kaymark would suffer any actual prejudice if Boley's Motion to extend the time to complete service of process was granted. The court below acted in accordance with the controlling law in remanding the matter to the District Court so

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12. The possibility that a subsequently filed action by Boley against Kaymark would be dismissed for statute of limitations reasons is a substantial reason why the court below acted correctly in reversing and remanding this matter to the District Court. *See Panaras v. Liquid Carbonic Industries Corp.*, 94 F.3d 338, 341 (7th Cir. 1996) ("... the fact that the suit cannot be resolved on its merits is a fact that must be given close attention" when a District Court has granted an F.R.C.P. 4 dismissal based on non-compliance with an F.R.C.P. 4 violation.

further consideration could be given by the District Court as to whether the District Court should or should not grant Boley's Motion to extend the time for completion of service of process.

This holding and action by the court below is consistent with the holding of other courts to the effect that delay in completion of the service of process not causing actual prejudice to a party, similarly situated as Kaymark, should not result in a dismissal which may preclude a resolution of the underlying claim on its merits. *See Del Raine*, *supra* ("the lack of prejudice to the defendant is a relevant factor in determining whether a case should be dismissed for failing to timely serve defendants . . ."); *Henderson*, *supra*, 116 S. Ct. at 1642 (the United States never claimed it lacked "notice" of the complaint, nor did the United States assert "any prejudice" from the "delayed service of summons and complaint").

The court below was correct in finding that the District Court based its denial of Boley's Motion to extend the time for service on an erroneous interpretation of the law. Considering there was no other reason given for the dismissal, it was also correct for the court below to remand this matter to the District Court so a record could be established to support whatever conclusion the District Court ultimately reaches on Boley's Motion.

III.

WHEN REVIEWING A DISCRETIONARY DECISION BY A DISTRICT COURT AND CONCLUDING THAT THE DISTRICT COURT BASED ITS DISCRETIONARY DECISION ON AN ERROR OF LAW AND WHEN THE DISTRICT COURT DID NOT MAKE ANY OTHER FINDING TO SUPPORT ITS DECISION, WHETHER THE COURT BELOW COMMITTED ERROR IN REMANDING THE MATTER BACK TO THE DISTRICT COURT TO MAKE FURTHER FINDINGS.

In Sections II(B), (C), (D) and (E) of Kaymark's Petition for Certiorari, claim is made that the court below committed error in failing to find sufficient reasons to support the granting of Boley's F.R.C.P. 4(m) Motion; in failing to find that Boley failed to meet his burden of proof to support such a Motion; failing to apply the appropriate abuse of discretion standard of review; and in failing to apply a sufficiently deferential standard of review of the District Court's Opinion.

The District Court, when denying Boley's F.R.C.P. 4(m) Motion, concluded that Kaymark would suffer "severe prejudice" if Boley's Motion was granted. The prejudice would, allegedly, result to Kaymark from a service of process beyond a time permitted by the controlling statute of limitations. This holding was the sole reason stated by the District Court when denying Boley's F.R.C.P. 4(m) Motion. For reasons previously explained, that conclusion was an error of law by the District Court.

The District Court making a discretionary decision based on an error of law commits an abuse of discretion. If the court below determines that the District Court's discretionary decision is based on an error of law, it should reverse and remand. *Icicle*

Seafood, Inc. v. Worthington, 475 U.S. 709, 714 (1986) ("if it believed that the . . . proper rule of law was misapplied to . . . findings, it could reverse the District Court's judgment"); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) ("The Court of Appeals, therefore, was quite right in saying that if a District Court's findings rest on an erroneous view of law, they may be set aside on that basis"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A District Court would necessarily abuse its discretion if it based its rulings on an erroneous view of the law . . .").

Boley, in his February 28, 1995 Rule 4(m) Motion in the District Court, provided, contrary to Kaymark's assertion on pages 10 and 11 of its Petition for Certiorari, reasons why the District Court should grant his Motion. They include: (1) that Boley, as of February 28, 1996, had mailed to Kaymark all of the documents required by F.R.C.P. 4(d)(2); and (2) that no harm had been suffered by Kaymark by this delay in completing service.[13]

Boley made an offer of sufficient reasons to justify the court below, after first finding that the District Court's holding was based on an error of law, to remand the matter back to the District Court. There is no compelling need for this Court now to review the court below's holding. There will be a more complete record developed by the District Court after remand. Depending upon the ruling by the District Court, a premature review of the court below's Opinion may well be unnecessary.

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13. Boley, on February 28, 1996 and again on March 21, 1996, forwarded Kaymark potentially all the documents Boley was required to provide Kaymark, per Rule 4(m). If Kaymark had returned the Waiver in response to either request (February 28 or March 21, 1996), that would have made Kaymark's pending Motion to Dismiss moot. Formal service of process would have been completed prior to the District Court rendering its Opinion.

Kaymark claims that the court below "created the very law that the District Court violated" (Pet. at 12). That "none of the objections suggested or implied by the Court of Appeals Opinion, concern error of law" (Pet. at 12).

The court below found that the District Court "relied on its finding of prejudice to Kaymark . . . Kaymark would lose the benefit of the statute of limitations" (Pet. at A5). In the context of this specific case, Kaymark "was sent a copy of the complaint only two days after it was filed . . ." (Pet. at A7). According to the court below, considering the F.R.C.P. 4(m) Adv. Comm. Notes 1993 (Pet. at A5), this was not a "relevant" factor "bearing" on the District Court's "decision" (Pet. at A8).

If the court below did not use the magic words "error of law", it certainly implied that the District Court abused its discretion because it committed an error of law. Considering: (1) Kaymark had timely actual notice of the action of Boley because it received a copy of a Complaint within a couple days of the date when the Complaint was timely filed; and (2) satisfaction of the tolling of the statute of limitations under the controlling law was not dependent upon formal completion of service of process, the court below correctly concluded that the District Court erroneously found that Kaymark would suffer prejudice if Boley's Motion was granted.

Kaymark also claims that the court below did not afford a sufficiently "deferential standard of review" to the District Court's holding to deny Boley's Rule 4(m) Motion. For this proposition, Kaymark relies on *Cooter & Gell, supra*; *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980); and *Koon v. United States*, __ U.S. __, 135 L. Ed. 2d 392 (1996). Contrary to Kaymark's assertion, the District Court's denial of Boley's F.R.C.P. 4(m) Motion was not as a consequence of any fact intensive finding. Rather, it was based upon an interpretation of law.

There were few facts developed in the court below. There was no hearing. There was no deposition testimony available to the District Court regarding the circumstances explaining why formal service of process had not been completed within F.R.C.P. 4(m). Likewise, there was no relevant correspondence between the parties or their representatives available to the District Court explaining the cause of the delay.

In the holdings relied upon by Kaymark, *i.e.*, *Cooter & Gell*, *supra*; *Curtiss-Wright Corp.*, *supra*; and *Koon v. United States*, *supra*, there were substantial and extensive factual findings by the District Court. If those types of factual findings were available here, then there would have been a record for the court below to afford the District Court the appropriate deferential standard of review.

The court below found that the District Court committed an error of law in concluding that Kaymark would suffer prejudice if Boley's F.R.C.P. 4(m) Motion was granted. The District Court did not provide in its Opinion any other reason for denying Boley's F.R.C.P. 4(m) Motion, other than a ruling that was based on an error of controlling law. Under these circumstances, the court below was acting well within the controlling law, *Icicle Seafoods*, *supra*; *Pullman-Standard*, *supra*; and *Cooter & Gell*, *supra*, in reversing and remanding the matter to the court below for "proceedings consistent" with its Opinion.[14]

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14. Considering the District Court based its decision on an error of law and gave no other supporting reasons for its denial of Boley's Rule 4(m) Motion, the Court of Appeals was then left with a holding by the District Court which was not supported by any relevant factors bearing on the exercise of its discretion. Under these circumstances, the appropriate remedy is to remand the matter to the District Court so the District Court can conduct a hearing, if necessary, and provide a further explanation for its ruling. *See United States v. Monaco*, 23 F.3d 793, 799, 803 (3rd Cir. 1994) ("... When a Circuit Court does not know how a District Court would exercise the discretion available to it under the

(Cont'd)

IV.

WHETHER THE COURT BELOW, CONSIDERING THAT WHATEVER STATUTE OF LIMITATIONS DEFENSE KAYMARK MAY HAVE TO THE CLAIM OF BOLEY HAS NOT BEEN IMPAIRED AND MAY BE RAISED AS A DEFENSE TO BOLEY'S CLAIM PER RULE 8(c) OF F.R.C.P., VIOLATED THE RULES ENABLING ACT, 28 U.S.C. § 2072, BY HOLDING THAT KAYMARK WOULD SUFFER "NO PREJUDICE" IF BOLEY'S F.R.C.P. RULE 4(m) MOTION WAS GRANTED.

Kaymark claims that the court below violated the Rules Enabling Act, 28 U.S.C. § 2072, in that it allows a circuit court to "empower" a District Court to deprive a party of a substantive defense through the exercise of discretion. Kaymark claims that the court below, by its ruling, impaired a substantive right of Kaymark and, therefore, violated the Rules Enabling Act, 28 U.S.C. § 2072. Kaymark suggests that the holding by the court below impairs Kaymark's statute of limitations defense which Kaymark may have to Boley's claim.[15]

(Cont'd)

law, the appropriate remedy is to remand the matter to the District Court"). *See also Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 154 (3rd Cir. 1986) (not being aware of the basis for the ruling or the exercise of discretion by the District Court prevents performance of appellate review and, therefore, requires remand).

15. Kaymark claims (16) the following:

> . . . Rule 4(m) interpreted presently by the Third Circuit abridges a substantive right of a defendant *because it empowers a District Court to strip him of the protection of the statute of limitations at the District Court's discretion.*

(emphasis supplied)

The claim that Kaymark's statute of limitations defense has been impaired is incorrect. Kaymark's statute of limitations has not yet been placed at issue or adjudicated. Kaymark is free to raise the statute of limitations defense when and if it files its Answer and pleads whatever affirmative defenses it may have to Boley's claim.

F.R.C.P. 8(c) specifically provides that a statute of limitations defense is an affirmative defense and one to be raised in an answer.[16] *See Senter v. General Motors Corp.*, 532 F.2d 511, 530 (6th Cir. 1976). Generally, whether a defense is an affirmative defense is governed by the law of the forum state when federal jurisdiction is based on diversity of citizenship. *Funding Systems Leasing Corp. v. Pugh*, 530 F.2d 91 (4th Cir. 1976).

Pennsylvania is the forum state for this action. Pennsylvania considers the statute of limitations defense as an affirmative defense. *Kozak v. City of Philadelphia*, 313 Pa. Super. 89, 459 A.2d 424 (1983); *Weber v. Wyoming Valley West School District*, __ Pa. Cmwlth. __, 668 A.2d 1218, 1221 (1995) ("the statute of limitations is an affirmative defense . . ."). Irrespective of whether Rule 8(c) controls or whether that issue is controlled by Pennsylvania law, it is clear that it is an affirmative defense to be raised in an Answer and Kaymark's Rule 12(b) Motion did not place this defense at issue in the District Court or the court below.

The holding by the court below that Kaymark would not

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16. F.R.C.P. 8(c) provides, in part:

> (c) Affirmative Defenses. In pleading to a . . . pleading, a party shall set forth affirma-tively . . . statute of limitations . . . and any other matter constituting an avoidance of an affirmative defense.

suffer "prejudice" if Boley's Rule 4(m) Motion was granted does not impact or impair whatever statute of limitations defense Kaymark may have to Boley's claim. The court below never held that Kaymark did not have a valid statute of limitations defense.

Kaymark has not yet filed an Answer. Rather, Kaymark chose to file a Rule 12(b) dismissal Motion. This did not place the statute of limitations defense at issue. Kaymark's right and ability to raise a statute of limitations defense in an Answer has not been impaired by the ruling of the court below and, therefore, there has been no violation of the Rules Enabling Act, 28 U.S.C. § 2072 by the court below.

CONCLUSION

For all the reasons noted above, Respondent, Wayne E. Boley, respectfully requests this Honorable Court to deny Kaymark's Petition for Writ of Certiorari.

Respectfully submitted,

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